Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 30 May 2017[1]

Case C-657/15 P

Viasat Broadcasting UK Ltd
v
TV2/Danmark A/S,

European Commission

(Appeal — State aid — Article 107(1)TFEU — Public-service broadcasting — Measures taken by the Danish authorities for the Danish broadcaster TV2/Danmark — Concept of 'aid granted by a Member State or through State resources' — Judgment in *Altmark*)

1. By its appeal, Viasat Broadcasting UK Ltd ('Viasat') asks the Court to set aside, in part, the judgment of the General Court of the European Union *TV2/Danmark* v *Commission*,[2] whereby the General Court, first, annulled Commission Decision 2011/839/EU,[3] in that the European Commission had held that the advertising revenue for 1995 and 1996 paid to TV2/Danmark through the TV2 Fund constituted State aid, and, second, dismissed, as to the remainder, the action of TV2/Danmark A/S ('TV2 A/S') seeking the partial annulment of that decision (TV2 A/S is a Danish public limited broadcasting company which was created in order to replace, for accounting and tax purposes as of 1 January 2003, the autonomous State undertaking TV2/Danmark ('TV2')). This case is linked to Cases C-649/15 P and C-656/15 P, which also relate to appeals against the judgment under appeal and in which my Opinion is also delivered today. This case is also similar to the case that gave rise recently to the judgment of 8 March 2017, *Viasat Broadcasting UK* v *Commission* (C-660/15 P, EU:C:2017:178).

I. Background to the dispute

2. In so far as the factual background of this case is identical to that of Case C-656/15 P, I refer to points 2 to 15 of my Opinion in that case, also delivered today.

II. The procedure before the General Court and the judgment under appeal

3. For the same reasons, I refer to points 16 to 19 of my Opinion in Case C-656/15 P.

1 Original language: French.

2 Judgment of 24 September 2015, *TV2/Danmark* v *Commission* (T-674/11, EU:T:2015:684) ('the judgment under appeal').

3 Decision of 20 April 2011 on the measures implemented by Denmark (C 2/03) for TV2/Danmark (OJ 2011 L 340, p. 1; 'the contested decision').

III. The appeal

4. In support of its appeal, Viasat relies on two grounds of appeal, concerning errors of law that it claims the General Court committed by, first, holding that the advertising revenue for 1995 and 1996 transferred from TV2 Reklame to TV2 through the TV2 Fund did not constitute State resources, and, second, misinterpreting the second condition established by the Court in its judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415; 'the *Altmark* judgment' and, with reference to the conditions required by the Court in that judgment, 'the *Altmark* conditions').

5. In accordance with Article 76(2) of its Rules of Procedure, the Court considered that it had sufficient information at the end of the written procedure and that, therefore, a hearing was not necessary.

A. The first ground of appeal

1. Summary of the arguments of the parties

6. Viasat claims, in essence, that the General Court, by holding, in paragraph 220 of the judgment under appeal, that the Commission ought not, in the contested decision, to have classified the advertising revenue for 1995 and 1996 as 'State aid', on the ground that that revenue did not constitute 'State resources', within the meaning of Article 107(1) TFEU, erred in law.

7. Viasat is supported by the Commission.

8. TV2 A/S and the Kingdom of Denmark do not accept that argument. In essence, they contend, first, that the revenue at issue did not constitute State resources, or, consequently, State aid, since the revenue came not from the Danish State, but from TV2's business. They submit, second, that the fact that TV2 Reklame and the TV2 Fund were public bodies owned and controlled by the Danish State was irrelevant in that regard, and, third, that the allegations of Viasat and the Commission with respect to the control exercised by the Danish State over the resources of those bodies were due to a misunderstanding of Danish law. TV2 A/S also argues that that revenue conferred no competitive advantage on TV2.

2. Assessment

9. The first ground of appeal relied on by Viasat is similar to that relied on by the Commission in support of its appeal in Case C-656/15 P, *Commission* v *TV2/Danmark*, in that each of those parties disputes the interpretation of the concept of 'State resources', within the meaning of Article 107(1)TFEU, and its application to the particular case by the General Court.

10. The analysis set out in my Opinion delivered today in relation to the single ground of appeal relied on by the Commission in Case C-656/15 P can be transposed *mutatis mutandis* to Viasat's first ground of appeal in the present case. I will therefore confine myself here to a summary of that assessment. For a fuller presentation of that analysis I refer to points 24 to 97 of that Opinion.

11. As regards, in the first place, the imputability of the measure to the State, it is not disputed in the present case that the public authorities must be regarded as having been involved in the adoption of that measure. [4]

12. As regards, in the second place, the requirement that the advantage must be granted directly or indirectly through State resources, that does not mean, as is clear from the Court's settled case-law, that it is necessary to establish in every case that there has been a transfer of State resources for an advantage granted to one or more undertakings to be capable of being regarded as a State aid within the meaning of Article 107(1) TFEU. [5]

13. With those considerations in mind, I shall examine *whether, by ruling that the Commission erred in law in classifying as 'State resources'*, in the contested decision, the advertising revenue for 1995 and 1996 transferred from TV2 Reklame to TV2, through the TV2 Fund, *the General Court correctly interpreted that concept of 'State resources'*, within the meaning of Article 107(1) TFEU.

14. As correctly stated by Viasat, the Court held in the judgment of 16 May 2002, *Commission* v *France*, 'Stardust Marine' (C-482/99, EU:C:2002:294, paragraph 37) that 'it has already been established in the case-law of the Court that [Article 107(1)TFEU] covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Therefore, even if the sums corresponding to the measure in question are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State resources'. [6]

15. The Court also held in paragraph 38 of that same judgment that 'by holding in the contested decision that the resources of public undertakings, such as those of Crédit Lyonnais and its subsidiaries, fell within the control of the State and were therefore at its disposal, the Commission did not misinterpret the term "State resources" in [Article 107(1)TFEU]. The State is perfectly capable, by exercising its dominant influence over such undertakings, of directing the use of their resources in order, as occasion arise, to finance specific advantages in favour of other undertakings'.

16. It is common ground in the present case that the State (the Kingdom of Denmark) was the sole shareholder of the public limited company TV2 Reklame, since the company's capital was subscribed by the State and the Minister for Culture had to approve the company's Statutes and amendments to them. TV2 Reklame was therefore wholly controlled by the State. [7]

17. I concur with Viasat's assertion that the transfer of the resources concerned through the TV2 Fund has no effect on their classification as 'State resources', since the TV2 Fund is also a public undertaking controlled by the Danish State.

4 See judgments of 16 May 2002, *France* v *Commission*, 'Stardust Marine' (C-482/99, EU:C:2002:294, paragraph 52); of 19 December 2013, *Association Vent De Colère! and Others* (C-262/12, EU:C:2013:851, paragraph 17); and order of 22 October 2014, *Elcogás* (C-275/13, not published, EU:C:2014:2314, paragraph 22).

5 See, inter alia, judgments of 16 May 2002, *France* v *Commission*, 'Stardust Marine' (C-482/99, EU:C:2002:294, paragraph 36); of 30 May 2013, *Doux Élevage and Coopérative agricole UKL-ARREE* (C-677/11, EU:C:2013:348, paragraph 34); and of 19 December 2013, *Association Vent De Colère! and Others* (C-262/12, EU:C:2013:851, paragraph 19).

6 The Court refers to the judgment of 16 May 2000, *France* v *Ladbroke Racing and Commission* (C-83/98 P, EU:C:2000:248, paragraph 50). See also footnote 15 of my Opinion delivered today in Case C-656/15 P.

7 That is apparent from Article 31(1) of the Bekendtgørelse af lov om radio- og fjernsynsvirksomhed (Danish Consolidated Law No 578 on broadcasting) of 24 June 1994 ('the 1994 Law'). See also recitals 80, 89 and 90 of the contested decision.

18. The fact that, as stated in the case-law of the Court which I have cited above, the resources of a public company which is wholly owned and controlled by the State are 'State resources' within the meaning of Article 107(1) TFEU seems to me to be a sufficient reason to propose that the judgment under appeal should be set aside. For the sake of completeness, I shall consider other reasons which will lead me to the same conclusion.

(a) The origin of the funds is not decisive

19. In paragraph 208 of the judgment under appeal, the General Court made the surprising inference from the case-law cited in paragraph 201 of that judgment,[8] read in conjunction with the judgments of 16 May 2000, *Ladbroke Racing* v *Commission* (C-83/98 P, EU:C:2000:248), and of 12 December 1996, *Air France* v *Commission* (T-358/94, EU:T:1996:194), that resources originating with third parties could constitute State resources *on the condition either* that those resources were voluntarily placed at the disposal of the State by their owners (as was done by the depositors of the Caisse des dépôts et consignations-participations in that judgment *Air France* v *Commission*), *or* that those resources had been abandoned by their owners (such as the winnings unclaimed by the placers of bets in the case that gave rise to the judgment in *Ladbroke Racing* v *Commission*), before concluding, in paragraphs 211 and 212 of the judgment under appeal, that the advertising revenue at issue in the case before it came from advertisers who had bought TV2 advertising air time and that those resources could not, therefore, be considered to fall under the control of the Danish State, since those resources had neither been voluntarily placed at the disposal of the State by their owners, nor abandoned by their owners and actually managed by the State.

20. That conclusion, reached by means of the argument made in paragraphs 202 to 212 of the judgment under appeal, is not one I can support, for two reasons.

21. First, contrary to what is said in the judgment under appeal, the origin of particular resources and their originally private nature (in the present case, the money paid by undertakings wishing to advertise on TV2) are irrelevant when examining the legal question of whether or not funds which have changed hands and are again in the possession and under the control of an entity which is wholly owned by the State are 'State' resources. The General Court therefore erred in law (particularly in paragraphs 208, 211 and 212 of the judgment under appeal) by emphasising elements other than the resources themselves (and, more particularly, their origin).[9]

22. Second, in paragraph 208 of the judgment under appeal, the General Court wrongly attempts to infer from the two judgments of the Court that one or other of two 'new' and additional conditions (see point 19 of the present Opinion) must be fulfilled in order for resources from third parties to be regarded as State resources.

23. The case-law cited above contains no evidence to support the conclusion — as suggested by the judgment under appeal — that the resources of public undertakings should be regarded as State resources within the meaning of Article 107(1) TFEU only where they were either voluntarily placed at the disposal of the State by their owners or abandoned by their owners and managed de facto by the State.

24. In any event, this does not emerge from the case-law that is relevant in the circumstances of the present case, namely the judgment of 16 May 2002, *France* v *Commission*, 'Stardust Marine' (C-482/99, EU:C:2002:294, paragraphs 37 and 38), which, furthermore, post-dated the two judgments on which the judgment under appeal seeks in vain to rely.

8 Judgments of 30 May 2013, *Doux Élevage and Coopérative agricole UKL-ARREE* (C-677/11, EU:C:2013:348, paragraph 35 and the case-law cited), and of 15 January 2013, *Aiscat* v *Commission* (T-182/10, EU:T:2013:9, paragraph 104).

9 See, in that regard, my Opinion delivered today in Case C-656/15 P (point 46 et seq.).

25. Further, while the second of the conditions suggested by the General Court (that of abandoned resources) clearly has no connection with the circumstances of the present case, the first (voluntary placement at the State's disposal) runs counter even to the most recent case-law of the General Court (judgment of 27 September 2012, *France* v *Commission* (T-139/09, EU:T:2012:496), which was not the subject of an appeal, paragraphs 63 and 64). [10]

(b) *The control of the public authorities is decisive*

26. I believe that, in paragraphs 212, 214 and 215 of the judgment under appeal, the General Court erred in law by giving an overly restrictive interpretation of the concept of 'control' in the context of the assessment of whether the Danish State exercised, through the TV2 Fund, control over the resources transferred from TV2 Reklame to TV2.

27. The General Court itself states in the judgment under appeal (paragraph 182) that it is clear from Article 29(2) of the 1994 Law that the TV2 Fund received the profit generated by advertising on TV2. It is also clear from that article that it was the Minister for Culture who decided on the share of the profit of TV2 Reklame that was to be paid into the TV2 Fund. As the General Court stated in paragraph 181 of the judgment under appeal and as stated in recital 81 of the contested decision, the part of TV2 Reklame's overall profit which was not paid to the TV2 Fund could be used by the Minister for Culture — with the approval of the Finance Committee of the Folketing (the Danish Parliament) — for the repayment of a State guarantee called on previously *or for cultural purposes* (see Article 33 of the 1994 Law). [11]

28. Consequently, the State enjoyed all the rights in and had full control over TV2 Reklame's profits and it was clear *directly from the legislation* that those resources could be used for purposes other than their transfer to the TV2 Fund.

29. In so far as the Minister for Culture was able to decide that the resources would be used for a purpose other than a transfer to the TV2 Fund, it should be concluded that the State controlled those resources, irrespective of how the Minister for Culture actually decided to use those resources in any given year.

30. Moreover, only the Minister for Culture could decide on the amount to be transferred, for any given year, from the TV2 Fund to TV2, since the transfer of resources from the TV2 Fund to TV2 could be made only in accordance with TV2's budget framework, established by the Minister for Culture. [12]

31. Consequently, the General Court erred in law, first, by failing to take into account, in its assessment of whether or not State resources are present, the fact that the State enjoyed all the rights in and had full control over TV2 Reklame's resources and could decide whether those resources were to be transferred to the TV2 Fund or used for other purposes, for example cultural ones, and, secondly, by failing to take into consideration the fact that the State fully controlled the resources of the TV2 Fund and could therefore decide unilaterally when those resources were to be transferred to TV2 and the amount to be transferred.

10 See my Opinion in Case C-656/15 P delivered today, paragraph 59.

11 See also recitals 81 and 84 of the contested decision.

12 See Article 30 of the 1994 Law, cited in footnote 28 of my Opinion in Case C-656/15 P delivered today.

(c) *The General Court misinterpreted the judgment of 13 March 2001, PreussenElektra (C-379/98, EU:C:2001:160)*

32. To justify its arguments that the Danish authorities did not have sufficient public control for the resources at issue to be classified as State resources, the General Court compared the present case to that which gave rise to the judgment of 13 March 2001, *PreussenElektra* (C-379/98, EU:C:2001:160).

33. I believe, on the contrary [13] (like Viasat), that the two cases are clearly distinct, both in fact and in law.

34. In the judgment of 13 March 2001, *PreussenElektra* (C-379/98, EU:C:2001:160), the Court held that there was no State aid, as the advantages granted to producers of green electricity were '*financed exclusively*' by private electricity suppliers with funds which '*at no stage came under the control*' of the State and which therefore 'in fact … never leave the private sphere' (see the Opinion of Advocate General Jacobs in the *PreussenElektra* case C-379/98, EU:C:2000:585, point 166). In the same vein, the judgment of 5 March 2009, *UTECA* (C-222/07, EU:C:2009:124); also cited by the General Court in the judgment under appeal), concerned, like the case that gave rise to the judgment of 13 March 2001, *PreussenElektra* (C-379/98, EU:C:2001:160), a situation in which the resources concerned had, at no stage, left the private sphere.

35. Two other factors underline the differences between the present case and the case that gave rise to the judgment of 13 March 2001, *PreussenElektra* (C-379/98, EU:C:2001:160).

36. First, the present case concerns transfers of resources from a public undertaking following a *decision taken every year* by *the Minister* for Culture, while the case which gave rise to the judgment of 13 March 2001, *PreussenElektra* (C-379/98, EU:C:2001:160), concerned a *general legislative provision* relating to transfers imposed on certain undertakings for the benefit of another category of (essentially private) operators.

37. Second, in the case which gave rise to the judgment of 13 March 2001, *PreussenElektra* (C-379/98, EU:C:2001:160), the company at issue (PreussenElektra) had not been tasked with managing an aid measure, since there was no compensation mechanism by which the companies bearing the additional cost would receive compensation in that capacity.

38. The approach adopted in that judgment therefore cannot apply in a situation where the State has created a distinct legal entity, such as TV2 Reklame, and appointed it to manage an aid measure. [14]

39. However, the facts in the present case are very similar to those in the case which gave rise to the judgment of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413). [15]

40. A public company (SEP) had been appointed to collect the amounts resulting from a price surcharge which the Netherlands State had, by law, imposed on purchasers of electricity in order to combat non-market-compatible costs. In practice, that surcharge was paid to the network operator who, every year, had to pay the proceeds to SEP. SEP then retained NLG 400 million (Dutch guilders) (EUR 181512086.40) to cover the non-market-compatible costs which arose in 2000 and transferred the excess to the Minister.

13 Bacon, K., *European Union Law of State Aid*, Oxford University Press, 2017, who follows his comments on the judgment of 13 March 2001, *PreussenElektra* (C-379/98, EU:C:2001:160) with the reflection that '*a rather different example of the analysis* of payments from private parties was the advertising revenues paid to the Danish broadcaster TV2, which the [General] Court held were not State resources despite the fact that the Danish authorities could restrict the percentage of those revenues that was transferred to TV2'(my emphasis).

14 Judgments of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413, paragraph 74), and of 19 December 2013, *Association Vent De Colère! and Others* (C-262/12, EU:C:2013:851, paragraph 35); and order of 22 October 2014, *Elcogás* (C-275/13, not published, EU:C:2014:2314, paragraph 32).

15 See, in particular, paragraph 74. See also order of 22 October 2014, *Elcogás* (C-275/13, not published, EU:C:2014:2314, paragraph 32).

41. The Court ruled in that case, first of all, that it was of little account that that designated company (SEP) was at one and the same time the centralising body for the tax received, the manager of the monies collected and the recipient of part of those monies, as it was possible to distinguish SEP's different roles and to monitor the use of the monies, with the consequence that, according to the Court, 'as long as that designated company did not appropriate to itself the amount of NLG 400 million (EUR 181512086.40), at the time when it was freely able to do so, that amount remained under public control and therefore available to the national authorities, which is sufficient for it to be categorised as State resources (see, to that effect, judgment of 16 May 2002, *France* v *Commission, ('Stardust Masine')*, C-482/99, EU:C:2002:294, paragraph 37)'.

42. The Court then stated that the measure in question in that case differed from that referred to in the judgment of 13 March 2001, *PreussenElektra* (C-379/98, EU:C:2001:160), 'in which the Court held, at paragraph 59, that the obligation imposed on private electricity supply undertakings to purchase electricity produced from renewable energy sources at fixed minimum prices did not involve any direct or indirect transfer of State resources to undertakings which produced that type of electricity. In the latter case, the undertakings had not been appointed by the State to manage a State resource, but were bound by an obligation to purchase by means of their own financial resources' (judgment of 17 July 2008, *Essent Netwerk Noord and Others*, C-206/06, EU:C:2008:413, paragraph 74).

43. As in the case which gave rise to the last mentioned judgment, TV2 Reklame is an autonomous public entity created for the purposes of collecting resources through the sale of advertising space on TV2 and appointed by the State to manage those resources.

44. The same reasoning also applies to the TV2 Fund, since it is a public entity and the Minister also had at his disposal the Fund's resources.

45. As in the judgments cited in footnote 14 above, the legislature established a scheme under which a public company (TV2 Reklame in the present case) receives compensation for the aid which it manages, in the present case in the form of the right to market TV2's advertising space.

46. Added to this is the fact that TV2 Reklame was not subject to an obligation to purchase from TV2 using its own financial resources, unlike the situation in the judgment of 13 March 2001, *PreussenElektra* (C-379/98, EU:C:2001:160). It is clear, however, from the Danish legislation that TV2 had to make advertising space available to TV2 Reklame and that TV2 Reklame was therefore not required to purchase that advertising space from TV2 for a pre-arranged price, as was the case in that judgment.

47. It follows that the General Court erred in law in holding that the present case was comparable to that which gave rise to the judgment of 13 March 2001, *PreussenElektra* (C-379/98, EU:C:2001:160), a misinterpretation which played an essential role in the statement of reasons given by the General Court for annulling the contested decision.

(d) *No difference as regards the origin of the licensing fee resources and the advertising revenue resources*

48. As is stated by Viasat, it is apparent from the foregoing that it is essential, if the resources of the TV2 Fund are to be correctly classified, that the resources of TV2 Reklame are classified as State resources, since they continue to be State resources after the transfer to the TV2 Fund just as the revenue derived from the licensing fee is State resources. Consequently, all the resources of the TV2 Fund can be classified as State resources.

49. The distinction made by the General Court between the origin of the advertising revenue transferred from TV2 Reklame to TV2 through the TV2 Fund and the origin of the audiovisual licensing fee resources transferred from the TV2 Fund to TV2 is neither logical nor justified in the present case.

50. It is difficult to discern how resources deriving from payments imposed by law on private users for access to public service television channels are different from payments made by private advertisers to obtain advertising space in those media. In both cases, they are resources obtained from third parties paid to a public undertaking, whether Danmarks Radio or TV2 Reklame, for consideration.

51. The errors of law to which I have referred reveal why the General Court came to the conclusion that those two types of resources should be treated differently, even though they had the same source.

52. It follows that the first ground of appeal must be upheld.

B. The second ground of appeal

1. *Summary of arguments of the parties*

53. Viasat claims that the General Court, by holding, in paragraph 106 of the judgment under appeal, that the contested decision is vitiated by an error of law with respect to the scope of the second Altmark condition, committed an error of law.

54. According to Viasat, when dealing with an action for annulment, the General Court ought to have confined itself to an examination of the reasons stated in that decision, and should not have based its assessment on the interpretation of that decision given, in the course of proceedings, by the Commission. In that regard, Viasat argues that, contrary to what the General Court held in paragraphs 97, 99 and 104 to 106 of the judgment under appeal, the relevant recitals of that decision do not state that the second *Altmark* condition 'includes the concept of efficiency of the recipient of the compensation'. Viasat considers that that condition, which requires the parameters on the basis of which compensation is to be calculated to be objective, transparent and established in advance, is designed to avoid any misuse of the concept of 'public service'. Viasat considers that the intervention of the Danish Parliament is insufficient to satisfy that condition.

55. Viasat is supported by the Commission.

56. TV2 A/S and the Kingdom of Denmark challenge the admissibility of the second ground of appeal.

57. On the substance, TV2 A/S does not accept that the General Court based its assessment in relation to the scope of the second *Altmark* condition only on the interpretation of the contested decision provided by the Commission during the written phase of the procedure. On the contrary, the General Court based its assessment both on the reasons stated in the contested decision and on the interpretation of that decision provided by the Commission in the course of the proceedings. In any event, TV2 A/S considers that, in accordance with the second *Altmark* condition, the parameters for calculating the compensation must be objective, transparent and established in advance.

2. *Assessment*

58. I agree with TV2 A/S and the Kingdom of Denmark that this ground of appeal is inadmissible.

59. Viasat states that it is individually and directly affected by the findings of the judgment under appeal in relation to the second *Altmark* condition.

60. Nonetheless, Viasat admits that, taken in isolation, that part of the judgment under appeal has no effect on its operative part (paragraphs 30 and 31 of its appeal).

61. In so far as the operative part of the judgment under appeal is in favour of Viasat and contains nothing in relation to the second *Altmark* condition, Viasat does not have the required *locus* to justify the Court undertaking a review of the reasons stated in the judgment under appeal in relation to that second condition.

62. Suffice it to state that, leaving aside the fact that this ground of appeal does not ask the Court to set aside, wholly or in part, the decision of the General Court as it appears in the operative part of the judgment and that it should therefore be declared to be inadmissible for that reason alone, this ground of appeal would have a purpose only if the Court were to uphold the first ground of appeal of appeal of TV2 A/S in Case C-649/15 P, *TV2/Danmark* v *Commission*, on the application of the fourth *Altmark* condition — which it should not according to my Opinion in that case delivered today — with the result that, in any event, it should be regarded as ineffective.

63. Viasat's argument that the substance of that ground of appeal can be examined by the Court because Viasat is directly and individually concerned by the reasons stated in the judgment under appeal in relation to the second *Altmark* condition, although the General Court ruled in its favour in the operative part of the judgment under appeal, has no effect on that assessment.

64. Consequently, this ground of appeal must be rejected as being inadmissible and, in any event, as being ineffective.

65. In the alternative, it must be observed that, in Case C-660/15 P, Viasat had also claimed in its appeal that due regard was not paid to the second *Altmark* condition.

66. In the interim, that appeal has been dismissed by the Court in the judgment of 8 March 2017, *Viasat Broadcasting UK* v *Commission* (C-660/15 P, EU:C:2017:178). The Court stated that 'the General Court … did not err in law when it held in the judgment under appeal that Article 106(2) TFEU does not require the Commission to take into consideration the second and fourth *Altmark* conditions in order to decide whether State aid is compatible with the internal market under that provision'.

67. It follows that the second ground of appeal must be rejected.

C. The effect of the judgment under appeal being set aside

68. Since by means of its fourth plea in law at first instance, raised in support of the third head of claim put forward in the alternative, the applicant at first instance claimed that the Commission erred in law, in that the Commission had held to be State aid the sums derived from advertising revenue for 1995 and 1996 that had been transferred through the TV2 Fund, and having regard to my analysis in relation to the first ground of appeal, it is clear that the Court must itself give a ruling and must dismiss as to the merits the third head of claim put forward in the alternative by the applicant at first instance.

IV. Costs

69. Under Article 138(3) of the Court's Rules of Procedure, applicable to appeal proceedings by virtue of Article 184(1) of those rules, where each party succeeds on some and fails on other heads, the parties are to bear their own costs. Given that Viasat has succeeded on the first ground of appeal but failed on the second, I believe that TV2 A/S should be ordered to bear its own costs and to pay 50% of Viasat's costs and, for the remainder, that the parties should bear their own costs.

70. Pursuant to Article 140(1) of the Rules of Procedure, also applicable to appeal proceedings by virtue of Article 184(1) of those Rules, the Member States and institutions which intervene in the proceedings are to bear their own costs. The Kingdom of Denmark, as an intervener before the General Court, is to bear its own costs.

V. Conclusion

71. For those reasons, I propose that the Court should:

– set aside the judgment of the General Court of 24 September 2015, *TV2/Danmark* v *Commission* (T-674/11 EU:T:2015:684), in so far as it annulled Commission Decision 2011/839/EU of 20 April 2011 on the measures implemented by Denmark (C 2/03) for TV2/Danmark solely on the ground that the Commission considered therein that the advertising revenue for 1995 and 1996 paid to TV2/Danmark through the TV2 Fund constituted State aid;

– dismiss as to the merits the third head of claim put forward in the alternative by the applicant at first instance;

– dismiss the appeal for the remainder;

– order TV2 Danmark A/S to pay 50% of the costs of Viasat Broadcasting UK Ltd and, for the remainder, order the other parties to bear their own costs.